85-904

No. .....

Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.

In The
Supreme Court of the United States
October Term, 1985

HENRY G. HERFORD,

Petitioner,

vs.

SUN PIPE LINE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF ON BEHALF OF PETITIONER HENRY G. HERFORD

PAUL HENRY KIDD
KIDD & KIDD
233 South Grand Street
P.O. Drawer 3168
Monroe, Louisiana 71210
(318) 325-3884

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

(1) Whether a clearcut factual dispute concerning the interruption of the period for processing an internal grievance in conformity with the Collective Bargaining Contract precludes the issuance of summary judgment, thus rendering Local Rule 47.6 of the Fifth Circuit inapplicable to the order of the Lower Court.

(2) Whether the failure of a Collective Bargaining Agreement to specifically establish a grievance procedure as the sole and exclusive means of dispute resolution allows the aggrieved employee to file a Section 301—breach of contract action—without resort to company remedies; and further, whether a grievance procedure providing no opportunity for review by an impartial decision-maker renders exhaustion of said remedies futile, as per the decisions of the court in *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) and *Glover v. St. Louis—S.F. Ry. Co.,* 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969), as well as the decisions of the Fifth Circuit in *Eitman v. New Orleans Public Service, Inc.,* 730 F.2d 359 (5th Cir. 1984), and *Rabalais v. Dresser Industries, Inc.,* 566 F.2d 516 (5th Cir. 1978), thus excusing any alleged nonexhaustion.

(3) Whether the failure of an employer to respond to a written complaint meeting all of the express requirements of an internal grievance amounts to a repudiation of the terms of the Collective Bargaining Contract, thereby estopping defendant from later asserting nonexhaustion of contractual remedies as a defense.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	ii
Opinion Below	1
Other Relevant Actions and Opinions Below	2
Statement of Jurisdiction	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting Writ	7
Argument	9
Conclusion	16
Appendix	App. 1

TABLE OF AUTHORITIES

CASES:

Boone v. Armstrong Cork Co., 384 F.2d 285 (5th Cir. 1967)	15
Day v. United Automobile, Aero. & Agr. Imp. Wkrs. Local 36, 466 F.2d 83 (6th Cir. 1972)	15
Eitman v. New Orleans Public Service, Inc., 730 F.2d 359 (5th Cir. 1984)	13
F. W. Woolworth Co. v. Miscellaneous Warehousemen's, 629 F.2d 1204 (7th Cir. 1980)	14
Glover v. St. Louis-S.F. Ry. Co., 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969)	13, 14
International Union, United Auto, Etc. v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962)	14
Johnson Farm Equipment Co. v. Cook, 230 F.2d 119 (8th Cir. 1956)	10

TABLE OF AUTHORITIES—Continued

	Page
Magill v. Gulf & Western Industries, Inc., 736 F.2d 976 (3rd Cir. 1984)	11
Neely v. St. Paul Fire and Marine Ins. Co., 584 F.2d 341 (9th Cir. 1978)	10
Rabalais v. Dresser Industries, Inc., 566 F.2d 516 519 (5th Cir. 1978)	13, 15
Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965)	14
Scott v. Anchor Motor Freight, Inc., 496 F.2d 276 (6th Cir. 1974)	11
Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 17 L.Ed.2d 842, 854 (1967)	12, 13, 15
MISCELLANEOUS:	
28 U.S.C. 2101	2
Federal Rules of Civil Procedure Rule 56 (A), (B), (C)	3
29 U.S.C. § 185 (A), (B)	3, 7
Local Rule 47.6 of the Fifth Circuit	8, 9, 11
Article VI (A) of the Collective Bargaining Agreement	9
Article VI, Section 1 of the Collective Bargaining Agreement	12, 14
Subsection 3 of Article VI	12

No. .....

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

HENRY G. HERFORD,

Petitioner,

vs.

SUN PIPE LINE COMPANY,

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

The petition of Henry G. Herford respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on July 23, 1985, rehearing denied on August 27, 1985.

—o—

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit, concerned herein is cited as — F.2d —, unreported at the time of filing this petition,

bearing docket number 84-4660, appended hereto as Appendix "A", page App. 1, hereof, and the denial of rehearing thereon dated August 27, 1985 is appended hereto as Appendix "B", pages App. 2-App. 3, hereof.

———o———

OTHER RELEVANT ACTIONS AND OPINIONS BELOW

(1). Judgment and rulings of the United States District Court for the Western District of Louisiana dated October 3, 1984, and September 17, 1984 (See, Appendix "C", pages App. 4-App. 9, hereof).

(2). Pages 8-15 of Petitioner's February 23, 1984 Deposition (See, Appendix "D", pages App. 10-App. 17, hereof).

———o———

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on July 23, 1985. (See, Appendix "A", page App. 1, hereof), a timely application for rehearing was filed and subsequently denied on August 27, 1985. (See Appendix "B", pages App. 2-App. 3, hereof).

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 2101 and Rules 17.1 and 20 of the rules of this court. This Application for Certiorari is filed in conformity with Rule 21 of the rules of this Honorable Court.

———o———

STATUTORY PROVISIONS INVOLVED

Rule 56 (A), (B), (C) of the Federal Rules of Civil Procedure provides:

> "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part hereof."
>
> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."
>
> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

29 U.S.C. § 185 (A), (B) provides:

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"Any labor organization which represents employees in an industry affecting commerce as defined in this act and any employer whose activities affect commerce as defined in this act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

STATEMENT OF THE CASE

On October 13, 1982, petitioner, an employee of Sun Pipe Line Company (hereinafter referred to as Sun) for approximately thirty-seven (37) years, received a message from company officials to be present at a meeting to be conducted in Monroe, Louisiana, the following day. Petitioner immediately contacted Mr. Hank Face, his union representative, who was unaware of the exact nature of the meeting. Pursuant to the orders of company officials, petitioner met with Sun representatives on the morning of October 14, 1982. The union representative, who had flown to Monroe, Louisiana, from Longview, Texas, in order to be available to petitioner for the meeting was not present at the meeting and did not consult with petitioner at any time prior to or during the meeting. R. 122.

Following a brief interrogation by company investigators, petitioner was notified of the termination of his employment with Sun Pipe Line Company on the same day, for allegedly violating "company policy." Peti-

tioner was not made aware of the particular grounds for his termination by either Sun officials or his union representative. R. 124.

Subsequent to the October 14, 1982, meeting there was no discussion between petitioner and his union representative concerning the exhaustion of administrative grievances as provided by the Collective Bargaining Contract. At this time petitioner was under the impression that the general policy of his union was to avoid all potential conflicts with management by assuming a very limited role in the employee grievance process. Petitioner's conclusion was based upon the fact that during the course of his lengthy employment, he had no independent recollection of any Sun employee filing a grievance against the company through the union representative. For this reason, petitioner concluded that it would be futile to rely upon union representation and felt compelled to retain legal counsel. R. 175-179.

Petitioner worked to and through October 16, 1982, which was designated as his separation date. R. 180. On the afternoon of October 20, 1982, petitioner contacted the undersigned counsel in connection with the pursuit of all available remedies against his former employer. R. 177. On the same date, petitioner contacted the Louisiana State Employment Security Office for the purposes of requesting unemployment compensation and ascertaining the reasons for his termination. R. 177. Petitioner then requested a copy of his employment contract from his union representative for the purpose of pursuing all available administrative and judicial remedies. R. 177. The requested information was not supplied to petitioner or his counsel for several days. R. 122.

It was not until November 1, 1982, that petitioner was informed by the Louisiana State Employment Security Office that the action of Sun had been based upon aggravated misconduct in the form of alleged incidents of theft and dishonesty concerning the misappropriation of company property and labor. R. 17. On November 2, 1982, petitioner, through the undersigned counsel, contacted Sun Pipe Line Company through Mr. Wendall A. Holloway, its southwest area manager, in an attempt to pursue all available administrative remedies. R. 181-182. On this occasion petitioner informed Sun that his termination had represented nothing more than a form of harassment and retaliation directed against him in response to his official complaints regarding the company's violation of state and federal laws governing the production of oil. R. 181. On November 11, 1982, petitioner's communication was referred to Mr. J. A. Ladner, Sun's chief legal counsel. R. 183. At no time subsequent to his November 2, 1982, communication did Sun, through any of its employees or representatives, notify petitioner that his complaint had been denied on the merits or denied as untimely filed.

An administrative hearing was conducted by the Louisiana State Employment Security Office on January 27, 1983, with regard to petitioner's application for unemployment compensation. On March 7, 1983, the Louisiana State Employment Security Office determined petitioner to be fully eligible for unemployment compensation due to the failure of Sun to prove that he had been discharged for misconduct in connection with his employment. R. 21. Despite these findings, Sun officials took no action concerning petitioner's pending complaint.

On April 28, 1983, petitioner filed suit in the Fifth Judicial District Court of the State of Louisiana, alleging

retaliatory discharge and the breach of contract. R. 16-21. Petitioner's State Court pleading merely alleged that the company had breached the terms of the contract by terminating him without just cause, and did not specifically allege a violation of the Collective Bargaining Agreement. Subsequent to the petition of the defendant seeking removal, the cause was removed to the United States District Court for the Western District of Louisiana on the basis of federal diversity and the authority of the Labor Management Relations Act; *29 U.S.C. § 185*. R. 1-6. Following the denial of petitioner's Motion to Remand the cause to the Fifth Judicial District Court, R. 50-56, the original complaint was amended to further allege the violation of a Collective Bargaining Agreement, defamation, and the violation of civil rights. R. 83-90. Petitioner's deposition was taken on February 23, 1984.

Defendant filed a Motion for Summary Judgment on May 3, 1984. R. 105-121. The United States District Court for the Western District of Louisiana granted Summary Judgment on September 17, 1984. The United States Court of Appeals for the Fifth Circuit affirmed the ruling of the District Court on July 23, 1985. Rehearing was denied on August 27, 1985.

———o———

REASONS FOR GRANTING WRIT

This Honorable Court should and ought to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because:

(1). The Judgment sought to be reviewed herein improperly disposed of petitioner's appeal pursuant to Local Rule 47.6 of the Fifth Circuit, despite the existence of a genuine factual dispute regarding the interruption of the period of time for filing an internal grievance;

(2). The judgment sought to be reviewed herein incorrectly applied the exhaustion doctrine even though the Collective Bargaining Agreement in question failed to establish an internal grievance procedure as the sole and exclusive means of dispute resolution; said omission clearly allowed the aggrieved employee to bring a Section 301—breach of contract action—without resort to company remedies;

(3). The judgment sought to be reviewed herein incorrectly applied the exhaustion doctrine although the contractual grievance procedure in question failed to provide an opportunity for review by an impartial decision-maker, thereby rendering exhaustion futile and excusing any alleged nonexhausiton of contractual remedies; and

(4). The judgment sought to be reviewed herein incorrectly applied the exhaustion doctrine despite conduct on the part of the employer which amounted to a complete repudiation of the remedial procedures purportedly provided by the Collective Bargaining Contract.

———o———

ARGUMENT

(A). The panel opinion improperly disposed of petitioner's appeal pursuant to Local Rule 47.6 of the Fifth Circuit despite the existence of a genuine factual dispute regarding the interruption of the fifteen (15) days period for filing an internal grievance—namely, the exact time at which petitioner first became aware of the actual reason for his abrupt termination and therefore able to file a grievance adequately presenting the facts upon which said grievance was based.

A significant portion of petitioner's argument is based upon the notion that the fifteen (15) days period for processing an internal grievance was interrupted by the failure of company officials to adequately notify him of the reason for his abrupt termination, thereby preventing him from presenting the facts upon which his grievance was based, as required by Article VI (A) of the Collective Bargaining Agreement. The precise time at which petitioner was made aware of the actual reason for his termination is a fact question which is subject to conflicting evidence.

Only two months prior to his termination petitioner had been threatened with dismissal in connection with disputes involving several employees of Sun Protection Company. See *Herford Affidavit*, (Exhibit 5). Petitioner arrived at the October 14, 1982, meeting believing that the subject of the day involved further difficulties with production personnel. *Herford Deposition*, P. 8. Although petitioner was generally questioned about several incidents which later served as the basis of the allegation of theft reported to the Louisiana Office of Employment Security, he was not specifically accused of theft, or dishonesty at such time. This contention is borne out by peti-

tioner's deposition, as well as fact that, according to defendant's Fifth Circuit brief, Sun officials approached the meeting with concerns of "possible dishonesty." See, *Defendant's Brief*, P. 3.

Petitioner testified that after being questioned about certain invoices, the Sun investigators confirmed his suspicion that he was actually being investigated in connection with his various problems with Sun production personnel. *Herford Deposition*, P. 15. The formal letter of termination merely provided that petitioner's dismissal was based upon a violation of "company policy." Petitioner's deposition, when read in its entirety, supports his contention that he was unaware of the reasons for his termination. Given the nature of the previous threat of termination, as well as the statement attributed to at least one of the Sun investigators, and the vague nature of the letter of termination, petitioner was reasonably justified in concluding that he was being fired as a result of ongoing disputes with production personnel.

It should be apparent that a genuine factual dispute exists between the positive testimony of petitioner and the hearsay information provided by Wendell Holloway, as to when petitioner was actually informed of the reasons for this discharge. Because this factual dispute may only be resolved by evaluation the credibility and demeanor of the witnesses, Summary Judgment was clearly inappropriate. See, *Neely v. St. Paul Fire and Marine Ins. Co.*, 584 F.2d 341 (9th Cir. 1978) (in considering a Motion for Summary Judgment the court decides a pure question of law and is not permitted to weigh the evidence or judge the credibility of witnesses); *Johnson Farm Equipment Co. v. Cook*, 230 F.2d 119 (8th Cir. 1956) (a

court is not at liberty to engage in a credibility evaluation for the purposes of a Summary Judgment); and, *Magill v. Gulf & Western Industries, Inc.*, 736 F.2d 976 (3rd Cir. 1984) (Summary Judgment is inappropriate if an issue depends upon credibility of witnesses since credibility can only be determined after the trier of fact observes the demeanor of witnesses). See, also, *Scott v. Anchor Motor Freight, Inc.*, 496 F.2d 276 (6th Cir. 1974) (whether an employee has attempted to exhaust the grievance and arbitration procedures established by the Collective Bargaining Agreement prior to bringing suit is a question of federal law and subject to proof at trial).

Because Summary Judgment was inappropriate, it logically follows that Local Rule 47.6 was inapplicable to the order of the lower court.

(B). The panel opinion failed to apply the well established jurisprudence of this Court, as well as the law of the Fifth Circuit, which recognizes that exhaustion of internal remedies is futile, and therefore unnecessary, in those circumstances in which the Collective Bargaining Agreement fails to provide for arbitration or review by an impartial decision-maker.

An adequate discussion of the legal issues involved initially requires a detailed analysis of the language of the applicable Collective Bargaining Contract. The clear and unambiguous language of the Collective Bargaining Agreement provides that the internal grievance procedure is "strictly limited to disputes arising over the interpretation of this agreement." R. 72. This contractual language implies that a dispute not involving the interpretation of the contract is not susceptible to the grievance procedure. It is urged that the questioned contractual language mili-

tates against the exclusivity urged by the defendant in the court below.

Moreover, it should be noted that the so-called five-step internal grievance procedure repeatedly alluded to by defendant merely provides for a complaint to be initially processed to the immediate supervisor; then to the superintendent; and then, subject to the discretion of the governing board of the association, to the manager of operations. (See Article VI, Section 1 of the Collective Bargaining Agreement). The grievance procedure conspicuously fails to provide for arbitration or any other effective remedy for the enforcement of the rights supposedly conferred by the agreement.

Finally, subsection 3 of Article VI of the questioned agreement invites aggrieved employees to forego the five-step internal grievance process, as well as the intervention of the association, by presenting a grievance directly to the company for adjustment. This language obviously undermines defendant's argument of exclusivity, since the contract recognizes an alternative to the five-step grievance procedure.

The crux of petitioner's argument involves two significant omissions within the questioned Collective Bargaining Agreement. In the first instance, the agreement fails to specifically establish an internal grievance procedure as the sole and exclusive means of resolving a dispute concerning discharge without just cause. See, *Vaca v. Sipes*, 386 U.S. 171, 184, 87 S.Ct. 903, 17 L.Ed.2d 842, 854 (1967) ("If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be an exclusive remedy, then a suit for breach of contract

will normally be heard even though such procedures have not been exhausted.").

Secondly, the agreement further fails to establish any means for the enforcement of the rights and benefits supposedly created by the contract. As such, the agreement facially created significant rights without providing an effective remedy in the form of a final decision by an impartial factfinder. In this regard, it is relevant to note that the vast majority, if not all, of the recently reported labor law cases of the lower federal courts use the terms "grievance" and "arbitration" synonymously.

The lower federal courts and particularly the Fifth Circuit, have recognized that "a grievant may file suit without fulfilling the exhaustion requirement if: (1) the union wrongfully refuses to process the grievance; (2) the employer's conduct amounts to a repudiation of the contract's remedial procedures; or, *exhaustion would be futile because of the lack of an impartial decision-maker.*" *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 362 (5th Cir. 1984), citing, *Vaca v. Sipes*, supra. (Emphasis added.)

In *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 516, 519 (5th Cir. 1978), The Fifth Circuit found that "exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group which is in large part chosen by the [employer and union] against whom [his] real complaint is made." The *Rabalais* decision correctly cited the holding of this Court in *Glover v. St. Louis - S.F. Ry. Co.*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969).

The fact that the grievance procedure set forth by the questioned Collective Bargaining Contract failed to pro-

vide for review of the complaint by an impartial decision-maker, but instead provided for ostensible review by company officials, without an arbitration provision, clearly brings this case within the *Glover* decision.

The total absence of a provision for the review of an employee's complaint by an impartial decision-maker left appellant, for all practical purposes, with no forum in which to present his discharge without just cause complaint. As such, the question as to whether appellant was in fact discharged without just cause was properly a question for the judiciary to resolve. See, *F.W. Woolworth Co. v. Miscellaneous Warehousemen's*, 629 F.2d 1204 (7th Cir. 1980), and *International Union, United Auto, Etc. v. Webster Elec. Co.*, 299 F.2d 195 (7th Cir. 1962).

(C). The panel opinion failed to consider conduct on the part of the employer which amounted to a repudiation of the remedial procedures purportedly provided by the Collective Bargaining Contract and further estopped the employer from later asserting nonexhaustion of internal remedies as a defense.

Although petitioner was not required to present his discharge without just cause complaint to various company officials prior to resorting to judicial remedies, it is shown that petitioner nonetheless "attempted" to exhaust all available internal remedies, as per the rule of *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614 (1965), within one day of discovering the reasons for his discharge. The record shows that petitioner, through the undersigned counsel, wrote a letter to defendant on November 2, 1982, which conformed to the requirements of Subsection 1 of Article VI of the Collectve Bargaining Contract. At no time since November 2, 1982, has defendant formally acted up-

on the grievance filed by petitioner or notified petitioner that his grievance was untimely. As such the inaction of the defendant estopped defendant from later raising the alleged nonexhaustion of remedies as a defense.

"An obvious situation in which the employee would not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of . . . contractual procedures . . . in such a situation . . . the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action." See, *Vaca v. Sipes*, supra, 17 L.Ed.2d at 855 (citations omitted). See also, *Day v. United Automobile, Aero. & Agr. Imp. Wkrs. Local 36*, 466 F.2d 83 (6th Cir. 1972) ("an employer may be estopped from a defense that an employee in a Collective Bargaining Agreement has not exhausted his administrative remedies"). For this reason, the inaction and indifference of the employer in totally ignoring the grievance procedure purportedly established by the Collective Bargaining Contract, must be deemed to constitute "a repudiation of the remedial procedures specified in the contract." *Rabalais v. Dresser Industries, Inc.*, supra, 566 F.2d at 519, citing *Boone v. Armstrong Cork Co.*, 384 F.2d 285 (5th Cir. 1967).

———o———

CONCLUSION

WHEREFORE, petitioner Henry G. Herford respectfully requests that this Honorable Court issue a Writ of Certiorari to review the July 23, 1985, order of the United States Court of Appeals for the Fifth Circuit, and that after due proceedings this court issue a decree reversing said order of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

KIDD & KIDD
PAUL HENRY KIDD
233 South Grand Street
P.O. Drawer 3618
Monroe, Louisiana 71210
(318) 325-3884

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4660

HENRY G. HERFORD,

Plaintiff-Appellant,

VERSUS

SUN PIPE LINE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

(July 23, 1985)

Before RANDALL, DAVIS and HILL, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4660

HENRY G. HERFORD,

Plaintiff-Appellant,

VERSUS

SUN PIPE LINE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTON
FOR REHEARING EN BANC

(Opinion July 23, 1985, 5 Cir., 198 –, — F.2d –)

(filed Aug. 27, 1985)

Before RANDALL, DAVIS and HILL, Circuit Judges

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and

Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

ENTERED FOR THE COURT:
/s/ W. Eugene Davis
United States Circuit Judge

REHC-6

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 83-1415-M

HENRY G. HERFORD

VERSUS

SUN PIPE LINE COMPANY

JUDGMENT

(Filed October 3, 1984)

Having duly considered the defendant's Motion For Summary Judgment and its Memorandum In Support Thereof, and having duly considered the petitioner's Response In Opposition To Defendant's Motion For Summary Judgment, and its Motion For A New Trial, and based upon the Ruling of this Court dated September 17, 1984;

IT IS HEREBY ORDERED that all claims of plaintiff Henry G. Herford, except his defamation claims, be, and the same hereby are dismissed in their entirety at plaintiff's costs.

THUS DONE AND SIGNED at Alexandria, Louisiana on this 3d day of October, 1984.

Judgment Entered 10-4-84

By (Illegible)
Copy To Kidd
Gear

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISON

CIVIL ACTION NO. 83-1415

HENRY G. HERFORD

-vs-

SUN PIPELINE COMPANY

RULING

(Filed October 3, 1984)

This matter is now before us on a Motion to Reconsider the Court's Ruling on the Motion for Summary Judgment. The complainant, Henry G. Herford, filed a Motion for a New Trial, and attached a memorandum in opposition to the Motion for Summary Judgment. The Court will consider the complainant's motion as a Motion to Reconsider the Court's Ruling on the Motion for Summary Judgment.

We find that there is no material issue of fact that Henry G. Herford was aware of the existence of the grievance procedure (see Herford deposition, p. 24., lines 22-23), and that there is no material issue of fact that after Herford's discharge, Mr. Herford was informed by Mr. Face that Herford could file a grievance in this matter. (See Herford deposition, p. 24, lines 24-25; p. 25, lines 1-4; and also affidavit of Mr. Hank Face).

We hereby affirm our Ruling, granting the Motion for Summary Judgment and the reasons set forth in support thereof.

DONE AND SIGNED at Alexandria, Louisiana, on this 3d day of October, 1984.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 83-1415

HENRY G. HERFORD

-vs-

SUN PIPELINE COMPANY

R U L I N G

(Filed Sep. 18, 1984)

This matter is now before us on a Motion for Summary Judgment filed by the defendant, Sun Pipeline Company, on May 3, 1984. A Motion for Extension of Time in which to respond to this Motion for Summary Judgment was filed by the plaintiff on May 15, 1984. On May 15, 1984, a sixty-day extension was granted to the plaintiff and the hearing date was upset and rescheduled for July 16, 1984 at 9:00 a.m. That date was then upset and rescheduled for hearing on Augsut 13, 1984 at 9:00 a.m. On August 13, 1984, a Motion for Continuance of the hearing scheduled for August 13, 1984 was filed by the plaintiff. On August 13, 1984, an extension of time was granted by the Court, in which all parties were to take depositions and submit all memoranda, in support of and in opposition to the Motion for Summary Judgment. The Court

ordered that the memoranda be submitted to the Court by September 12, 1984.

In view of the numerous delays granted by this Court, we will consider the merits of this motion based upon the record, without need for oral argument.

The facts are uncontroverted. On October 14, 1982, the complainant, Henry G. Herford, was advised of the termination of his employment with Sun Pipeline Company. There was in existence at this time a collective bargaining agreement between Sun Pipeline Company and the Sun Pipeline Employees Association, the latter of which complainant was a member in good standing. Any dispute or grievance that Henry G. Herford may have had over his discharge was subject to Article VI of the collective bargaining agreement, which provides an exclusive contractual grievance procedure for the resolution of disputes.

Henry C. Herford was aware of the existence of the collective bargaining agreement between Sun Pipeline Company and the Sun Pipeline Employees Association that covered the period from February 1, 1982 to February 1, 1984. Mr. Hank Face, Sun Pipeline Employees Association President and union representative for Henry G. Herford, advised Mr. Herford on October 13, 1982 and on October 20, 1982 that Mr. Herford could file a grievance over his discharge. Mr. Herford chose not to file a grievance. After the expiration of the fifteen-day period for filing grievances, set out in Article VI of the collective bargaining agreement, complainant's counsel contacted Sun Pipeline Company by letter dated November 2, 1982, threatening litigation. This action was filed on April 28, 1983 in State court, six months and one week after the

discharge on October 14, 1982. The case was then removed to this Court on June 2, 1983.

The complaint alleges a breach of a collective bargaining agreement under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185.

We find that individual suits for breach of a collective bargaining agreement must be dismissed where there has been no exhaustion of the contractually established grievance procedures. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580, 58 L.R.R.M. 2193 (1965). An employee may not sidestep the grievance procedure provided in the contract, pursuant to the strong Federal policy favoring deference to dispute resolution procedures agreed upon through collective bargaining. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 L.R.R.M. 2481 (1976). We find that the uncontroverted facts establish that the complainant has failed to exhaust his contractual remedies under the existing collective bargaining agreement. Although the Union's President solicited the filing of a grievance over the discharge within the fifteen-day limitation period of the grievance procedures, the complainant chose not to file such a grievance.

Absent either employer repudiation of the contractual procedures, or the Union wrongfully refusing to process the grievances, summary judgment is appropriate in this case. *Hines v. Anchor Motor Freight, Inc., supra; Vaca v. Sipes*, 386 U.S. 171 (1967); *Coe v. Rubber Workers*, 571 F.2d 1349, 98 L.R.R.M. 2304 (5th Cir. 1978).

The allegations in the complainant's Amended and Supplemental Complaint, on intentional infliction of men-

tal distress or emotional injury, are grounded on Louisiana law and are preempted by Section 301 of the National Labor Relations Act. All of these allegations constitute a single claim for relief for breach of a collective bargaining agreement. The State law claims are inextricably intertwined with the breach of collective bargaining claim and are preempted by the exclusive application of Federal law in this area. *Brice v. McDonald Douglas Corp.*, 111 L.R.R.M. 2031 (D.C. Ca. 1982).

We therefore find that as to all claims, except the complainant's defamation claims, stated in the complainant's Amended and Supplemental Complaint, are properly dismissed on this Motion for Summary Judgment. We find that no genuine material issue of fact exists and that the mover is entitled to summary judgment as a matter of law.

It is hereby ORDERED that the Motion for Summary Judgment be GRANTED and that the defendant submit a formal judgment within ten days of the signed date of this Ruling.

DONE AND SIGNED at Alexandria, Louisiana, this 17th day of September, 1984.

/s/ Illedgible .....
UNITED STATES DISTRICT JUDGE

APPENDIX D

(p. 8) Mr. Jett at that point?

A No. No, I didn't call him.

Q Do you recall calling a Mr. Face with the Union that night?

A Yeah, I called Mr. Face, Hank Face, the—

Q What did you tell him or find out from him?

A I asked him what—what was going—asked him did he know of anything going on. He said, "No," he had to report to the plane at nine o'clock the next morning at the airport.

Q Did you indicate that you had some idea what might be involved?

A No. We—we discussed it and had—I just thought it was some more of the stuff that I was having trouble with Sun Oil on moving the oil.

Q Sun exploration?

A Production department.

Q Sun production?

A Uh-huh (yes).

Q Okay.

Mr. Kidd: Why don't you, Henry, make a distinction when you're talking about Sun, whether it's production or the pipe line.

A This—this—this is Sun Production Department.

Q Well, they're separate corporations; you know that?

(p. 9) A Yes, sir. Yes, sir, I thought it the same as different companies altogether.

Q So if you would when you're referring to the Sun production people, call it as Sun Production; and when you're referring to Sun Pipe Line, to that corporation, if you'd call it Sun Pipe Line, that would probably help us out in a month or so when we read back through this transcript.

Mr. Kidd: And for the record, if you don't mind, when—I think he's made reference to Sun Oil two or three times, and my understanding was he was referring to Sun Production. Is that right or wrong?

Mr. Herford: That's right. That's right.

Mr. Gear: All right, then.

Mr. Herford: That's all Sun Production that we have discussed.

Q Okay. So you on October 14 came to Monroe for this meeting?

A Yes, sir, at eleven o'clock.

Q Who did you meet with first?

A In the lobby of the Holidome I ran into Mr. Holloway and he in—he took me down and said he wanted to—for me to meet two fellows and for me to answer all their questions.

Q And who were there?

(p. 10) A I don't remember their names, the—the two fellows.

Q Mr. Mike Caldwell: Does that sound right?

A Is he a blond—big blond-headed fellow?

Q There were two people, I understand, to be there. One was a Mr. Caldwell and one was a Mr. Arbogast.

A Mr. Arbogast, I remember him being there, but the other fellow, I do not know his name.

Q All right.

Mr. Kidd: How do you spell that name?

Mr. Gear: A-r-b-o-g-a-s-t.

Q Mike Caldwell and Carl Arbogast was my information on that, but—

A I've got his card in here, one reason I know his name.

Q So you were introduced to these gentlemen, huh?

A To answer their—all questions.

Q And where did y'all go, into a room at the Holidome?

A Mr. Holloway carried me into this room in the Holidome.

Q Could you tell us what was said while y'all were in this room, please?

A Well, it—quite a bit of questions. They asked me different—about different things that was taking—that I had done on how some tickets was signed out of—

oh, for (p. 11) instance, like they was sandblasting all the stations in the Delhi Field where we were purchasing oil and painting them, and I would charge the time to right-of-ways and send for them to do that that way and not charge this showing the air compressor and stuff out there that—and they wanted to know who give me authority to do that, and I told them Mr. Ellis Carre and Joe Rizzo at that time.

Q Who was that? Rizzo?

A Rizzo. He was a con—a assistant foreman. And would repaint it and I'd have to—

Q What other items did they mention to you?

A Something about stealing oil, three or—or stealing oil and how did I go about getting it and what did I use it for. And sometimes—I don't know where they got the word "stealing"; I never stole anything in my life—and—

Q What did you tell them that day about that?

A I told them that sometimes I would dip it out of the sump pit. That was the—where we could bleed our air into a little pit that came from the station 'cause it—in running oil, you've got to get all the air out or the pump will just sit there and run with—with air in it and it'll even burn it up. And I told him that I never stole any oil; I used it for the company business, burning trash and trees, especially—I'd clear up some right-of-ways and would take the oil in a drum and—and start the fire to get the trees (p. 12) and the brush to burn. And I did that on several occasions, and that was a practice of—of us doing it everywhere.

Q And this is what you told them?

A Yeah, uh-huh (yes).

Q Did they accuse you of using some of the oil to burn relatives' grass?

A Yeah, yeah.

Q And what did you tell them about that?

A I told them, "No, I wasn't."

Q Did they give you any names in connection with that?

A They said something about my nephew. No, they didn't give no name; just said my nephew.

Q Did they give you any names about this sand-blasting business you were talking about, about the—

A. No.

Q —about the right-of-way versus sandblasting?

A Uh-huh (no.)

Q What else did they make accusations about?

A Somethink about hay cutting.

Q What about hay cutting?

A Never had any hay—I had hay cut but not—not with company labor, not with contract labor. I paid—paid for that. Got checks so you—I did—did have some hay cut. And Mr.—the young boy by the name of Hayes from Dunn, Louisiana did the cutting and baling.

(p. 13) Q And this is what you told the (inaudible)—

A Uh-huh (yes).

Q Okay. What did they say to that? Did they bring up any other information about this hay cutting and baling?

A Yeah, they said something about the—they had some evidence that the man that was working for me pretty regular was out there mowing—cutting my hay.

Q Did they mention his name?

A Morgan, I believe is his—his name.

Q And what was your response to that?

A Told them he—he didn't—he had—wasn't out there cutting my hay. But found out that—later that he had got on the mower and had—some of the people there had—said they had seen him, and I asked him about it and he said, "Yes, he did."

Q Oh, he got on the mower without your knowledge?

A Without my knowledge. That—the morning that he was out there, I told him not to cut the hay early that morning, that it was too wet and not to cut it.

Q You discovered this after you were discharged; is that correct?

A Yes, sir, after I was discharged.

Q What was he doing out there that day?

A Well, he runs—right there at the same place he—it's a little five-acre place right beside Interstate-20 and we have Lact No. 1 right there by it and he runs scrapers (p. 14) from the Lact No. 1 into our relay station where the manifold is—is. And that's his job and walk—walk the lines.

Q Do you have any lines across that area where he was baling?

A One right—right—it joins one—he puts in the scraper where—where we were cutting the hay.

Q Where is that? The western end of that or—

A No, that's on the east end, right by Highway No. 17 and Interstate-20.

Q Whose property is that?

A Mrs. Snider's.

Q Were you leasing that?

A No. I was leasing it from Homer Harley. I wasn't leasing it; I was just going to cut the hay there and pay her so much a bale for the hay. And Homer Harley was handling it for her because he's had it leased.

Q I see. Where did that hay end up that this fellow cut?

A It ended up at a little pasture just across the road from—across the Interstate there on No. 17, under a shed.

Q Was it used by you? Were the bales used by you?

A What's that?

Q Were the bales used by you?

A Yeah, by me and my son.

Q For your cattle?

(p. 15) A Uh-huh (yes).

Q I see. Did y'all say anything else about this hay that was being discussed?

A No, uh-uh (no).

Q What else did they bring up?

A Well, I don't remember just—just all what. I think that was about all, until—as soon as I mentioned the oil shortage, this big—I said—at that time I found out what—what the problem was and what they were after. And I told them that ever since the big oil shortage the day I came into Delhi, that this—I was having problems with the production department. And the big blond-headed fellow get up and left. In about five minutes to ten minutes he came back in the room. And his answer was to the other fellow, "He's right." And it wasn't any more questions asked then, and Mr. Holloway brought in the letter to discharge me.

Q Mr. Holloway came into that room where you were?

A That's right, and said he hated to do something but "Here's the letter that—I'll have to read it to you"; and he read it to me. And that ended all the questions.

Q Well, did they mention some pipe?

A Yeah, it was for some pipe there, but I don't remember just details about it.

Q Did they ask whether you'd had some joints of pipe hauled to your house by some contract labor?

* * *